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No.

In the Supreme Court of the United States

OCTOBER TERM, 1983

THE TRAVELERS INSURANCE COMPANY,
APPELLANT

v.

COMMONWEALTH OF MASSACHUSETTS

On Appeal From The Supreme Judicial Court For The Commonwealth Of Massachusetts

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Whether a state statute requiring insured employee benefit plans that result from collective bargaining to provide specified benefits for payment of mental health services is preempted by the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.*[1]

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[1] The Travelers Insurance Company and Metropolitan Life Insurance Company were the appellants in the Supreme Judicial Court for the Commonwealth of Massachusetts. Metropolitan will also docket an appeal to this Court and will discuss preemption under the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1144(a). Travelers joins in Metropolitan's arguments concerning ERISA and incorporates them by reference in this Jurisdictional Statement.

In accordance with Rule 28.1 of the Rules of this Court, Travelers states that it has no subsidiaries other than wholly-owned subsidiaries. Its parent company is The Travelers Corporation.

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JURISDICTIONAL STATEMENT

The Travelers Insurance Company ("Travelers") appeals from a judgment of the Supreme Judicial Court for the Commonwealth of Massachusetts holding that the Massachusetts "mandated benefit" statute, Mass. Gen. Laws Ann. c. 175, § 47B ("Section 47B"), is not preempted by ERISA or by the NLRA.

OPINIONS BELOW

The opinion of the Supreme Judicial Court for the Commonwealth of Massachusetts (App. A, 1a-8a)[2] following this Court's remand (App. C, 10a-12a) is reported at 391 Mass. 730

[2] "App." refers to the separately bound appendix filed jointly in this Court by appellant and Metropolitan Life Insurance Company.

and 463 N.E.2d 548. The opinion of the Supreme Judicial Court prior to this Court's remand (App. D, 13a-34a) is reported at 385 Mass. 598 and 433 N.E.2d 1223. The findings and conclusions of the trial court (App. E, 36a-62a) are not reported. The trial court's opinion on the Commonwealth's motion for preliminary injunctive relief (App. I, 71a-84a) is not reported.

JURISDICTION

The judgment of the Supreme Judicial Court for the Commonwealth of Massachusetts following remand (App. B, 9a) was entered on April 25, 1984. A notice of appeal to this Court (App. K, 93a-94a) was filed on May 29, 1984. On July 12, 1984, Justice Brennan extended the time for docketing the appeal to September 22, 1984. *See* special appendix included with Jurisdictional Statement of Appellant Metropolitan Life Insurance Company. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2).

STATUTES INVOLVED

Section 47B of the Massachusetts General Laws Chapter 175 and the relevant provisions of the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.*, and the McCarran-Ferguson Act, 15 U.S.C. §§ 1011 *et seq.*, are reproduced in App. J, 87a-92a.

STATEMENT OF THE CASE

In 1973 the Massachusetts Legislature passed the "mandated benefit" statute at issue in this case. The statute requires employee benefit plans and insurance policies insuring such plans (as well as other health insurance policies) to provide

specified benefits for the payment of certain mental health services.[3] It became effective on a mandatory basis on January 1, 1976.

A report of the Legislature's Joint Committee on Insurance, which sponsored this legislation, indicates that the Committee was concerned about increasing the opportunity for private psychiatric treatment "[f]or the working persons and their families." The Committee recognized that publicly-supported mental health facilities were already "costing Massachusetts taxpayers millions of dollars annually." It also recognized, however, that through the mechanism of a mandated benefit statute there existed "a great potential for increased revenue to the Commonwealth, because of third party payments from insurance companies." App. F, 52a. Prior to the drafting of the new statute, the Committee made studies of the insured benefit plan experiences of such organizations as the United Auto Workers, the Retail Clerks (Local 770), the Kaiser-Permanente Plan, and the Group Health Association covering federal employees.

The resulting statute, Section 47B, sought to shift a portion of the cost of mental health care in Massachusetts to the private sector. It sought to do this by two means: first, by directly compelling all employee benefit plans (whether in-

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[3] In particular, Section 47B requires that employee benefit plans and health insurance policies shall "provide benefits for expense. . . arising from mental or nervous conditions" of the following types (App. J, 88a):

> (a) In the case of benefits based upon confinement as an inpatient in a mental hospital under the direction and supervision of the department of mental health, or in a private hospital licensed by the department of mental health, the period of confinement for which benefits shall be payable shall be at least sixty days in any calendar year.
>
> (b) In the case of benefits based upon confinement as an inpatient in a licensed or accredited general hospital, such benefits shall be no different than for any other illness.
>
> (c) In the case of outpatient benefits, these shall cover, to the extent of five hundred dollars over a twelve-month period, services furnished [by persons or institutions having certain specified qualifications].

sured or uninsured) to provide mental health care benefits to Massachusetts residents "covered under any such . . . plan"; and, second, by mandating that all health insurance policies insuring such plans (as well as other health insurance policies) contain the particular provisions for mental health care benefits specified in the statute. The insurance provisions of the statute have the effect of mandating the benefits that insured plans provide to their beneficiaries. Only if the plan dispenses with insurance—not merely insurance for mental and nervous conditions but all health insurance—can it avoid the statute's compulsion.

The Commonwealth has not sought to enforce Section 47B to the extent it applies to employee health and welfare plans directly. It concedes that ERISA prevents this. App. F, 43a and 59a. The Commonwealth has, however, sought to enforce the other provisions of the statute.

Travelers has issued numerous group health insurance policies for employee benefit plans. Certain of these were issued to provide benefits for employee benefit plans that resulted from collective bargaining under the NLRA. The employee medical benefits plan of General Telephone and Electronics Corporation ("GTE") is one example. The GTE plan covers approximately 608,000 plan participants residing in more than 30 states.

Some collective bargaining agreements specify the particular medical expense benefits provided by insured plans. Others prescribe the level or amount of employer contributions to insured plans. In each case the insurance policy serves as the mechanism for providing the bargained benefits; it implements the terms of the collective bargaining agreement. Where the collective bargaining agreement specifies the particular benefits to be provided—a common practice—the benefit terms of the collective bargaining agreement and of the insurance policy are usually identical. As collective bargaining brings changes in the plan terms, corresponding changes are made in the policy terms.

Mental health benefits compete with other insurance benefits and other forms of compensation for inclusion in the collective bargaining agreement. When a state mandates mental health benefits, other benefits of the parties' choosing must be omitted.

On June 1, 1979 the Commonwealth commenced this action for (i) a declaration that Section 47B can validly be applied to insured employee benefit plans and (ii) an injunction directing Travelers and Metropolitan to comply with the state statute. On August 28, 1979 the trial court ordered the defendants, pending trial and determination of this action, to provide the mental health benefits mandated by Section 47B in their group health insurance policies issued after January 1, 1976. App. I, 71a-84a.

After trial on the merits, the trial court concluded that Section 47B was not preempted by ERISA or by the NLRA and granted the permanent injunction sought by the Commonwealth. App. F, 36a-62a. Judgment was entered on October 22, 1980. (App. G, 63a-66a). The Commonwealth moved to amend the judgment to change the scope and wording of the injunction; this motion was allowed, and the final amended judgment was entered on December 1, 1980. App. H, 67a-70a.

The Supreme Judicial Court for the Commonwealth of Massachusetts affirmed the judgment of the trial court. App. E, 35a. Travelers and Metropolitan appealed to this Court. By order dated July 6, 1983 (App. C, 10a-12a), this Court vacated the judgment of the Supreme Judicial Court and remanded the case to that Court for further consideration in light of this Court's decision in *Shaw* v. *Delta Air Lines*, 103 S.Ct. 2890 (1983), which discussed ERISA preemption.[4] On remand, the

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[4] On remand, the appellants preserved and reiterated their position concerning preemption of Section 47B by the NLRA. *See* Brief For Defendants-Appellants On Remand From The Supreme Court Of The United States, at 2 n. 1.

Supreme Judicial Court, with one Justice dissenting, again affirmed the judgment of the trial court (App. B, 9a) and reiterated its earlier opinion that ERISA does not preempt Section 47B. App. A, 1a-8a.

THE QUESTION IS SUBSTANTIAL

Whether a state, through the medium of a purported insurance statute, may mandate the health benefits provided by collective bargaining agreements is a question of far-reaching importance. It has never been considered by this Court. Its resolution involves the accommodation of conflicting federal and state interests. A fundamental federal interest is protection of the collective bargaining process from state attempts to dictate or interfere with the substantive terms of collective bargaining agreements. A traditional interest of the states is regulation of the business of insurance. Accommodation of these conflicting federal and state interests necessarily involves the task of defining the appropriate reach and interrelationship of two major federal statutes, the NLRA and the McCarran-Ferguson Act.

Resolution of this problem has widespread significance. State statutes similar to Section 47B, mandating various health benefits for insured employee benefit plans, have been enacted in numerous states other than Massachusetts.[5] Most of these statutes are of relatively recent origin—within the past nine or ten years—and the list is growing. Hundreds of collectively bargained employee benefit plans across the country, and vast numbers of employees covered by such plans, are affected by

[5] The statutes relating to mental health illness include: Cal. Ins. Code § 10125; Colo. Rev. Stat. § 10-8-116(7)-(11); Conn. Gen. Stat. Ann. § 38-174d; Fla. Stat. Ann. § 627.668; Ga. Code Ann. 56-3110; Ill. Ann. Stat. ch. 73, § 982e; Kan. Stat. § 40-2, 105; La. Rev. Stat. Ann. § 22:213.2; Md. Ann. Code art. 48A, § 477E; N.H. Rev. Stat. Ann. 415:18-a; N.Y. Ins. Law 162(16); N.D. Cent. Code § 26-39-01 to 26-39-05; Ore. Rev. Stat. § 743.558; Tenn. Code Ann. § 56-1167; Vt. Stat. Ann. tit. 8, § 4089; Va. Code § 38.1-348.7; W. Va. Code § 33-16-3a; Wis. Stat. Ann. § 632.89.

the determination whether states can or cannot compel changes in collective bargaining agreements by means of statutes bearing the banner of insurance.

The desirability of plenary determination by this Court is underscored not only by the question's importance. Plenary treatment is also warranted in light of the fact that the court below deemed it necessary, in denying NLRA preemption, to rely upon two distinctly novel grounds. An "exception" to NLRA preemption was found and used which the Massachusetts court admitted that this Court has never held to exist. Alternatively, an interpretation was assigned to a key section of the McCarran-Ferguson Act—without analysis, in a footnote—which neither this Court nor any other court has ever adopted.

I. Section 47B Is Preempted By The NLRA Because It Overrides The Health Benefit Terms Of Collectively Bargained Employee Benefit Plans, And Thus Interferes With The Free Negotiation Of Mandatory Subjects Of Collective Bargaining.

Section 47B dictates the terms of group health insurance policies which implement the health benefit provisions of collective bargaining agreements. Health benefits are mandatory subjects of collective bargaining. *Allied Chemical Workers* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 159 (1971); *W.W. Cross & Co. Inc.* v. *NLRB*, 174 F.2d 875 (1st Cir. 1949). The effect of Section 47B's application is that health benefits specified by the state legislature are required to be paid, even though the terms of the collectively bargained plan itself do not provide such benefits. The statute, in short, overrides the terms of the parties' collective bargaining agreement.

This Court's decisions "have announced two doctrines" for determining whether state regulations or causes of action are preempted by the NLRA. *Belknap, Inc.* v. *Hale*, 103 S.Ct.

3172, 3176-77 (1983). The first, set out in *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959), is designed to protect the primary jurisdiction of the National Labor Relations Board by prohibiting state interference with the NLRB's interpretation and administration of federal labor law. Under this doctrine,

> state regulations and causes of action are *presumptively* preempted if they concern conduct that is actually or arguably either prohibited or protected by the [NLRA].

Belknap, Inc. v. *Hale, supra*, at 3177 (emphasis added). The presumption may be rebutted, under this doctrine, by a showing that the regulated conduct "is of only peripheral concern to the federal law or touches interests deeply rooted in local feeling and responsibility" which Congress intended to leave open to state regulation. *Id.*

The second preemptive doctrine, set out in *Lodge 76, Int'l Ass'n of Machinists* v. *Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976) ("*Machinists*"), is designed to protect the freedom created by federal law for labor and management to bargain collectively over wages, hours, and other terms and conditions of employment. This doctrine "proscribes state regulation and state-law causes of action concerning conduct that Congress intended to be unregulated . . . ." *Belknap, Inc.* v. *Hale, supra*, at 3177. *See also International Union of Operating Engineers* v. *Jones*, 103 S.Ct. 1453, 1459 n. 8 (1983). The proscription is not presumptive; it is conclusive.[6]

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[6] Although state interference under the *Machinists* doctrine results in preemption which is not presumptive, and therefore not subject to rebuttal, there is no preemption to begin with if it is shown that Congress expressed in some other statute an intention to tolerate such state regulation notwithstanding its interference with federal labor policy. *See e.g., Malone* v. *White Motor Corp.*, 435 U.S. 497 (1978); *New York Telephone Co.* v. *New York Dept. of Labor*, 440 U.S. 519 (1979).

There is no such expression of tolerance applicable to Section 47B. The McCarran-Ferguson Act does not provide it. *Infra*, part 2. And in ERISA

The *Machinists* doctrine governs the question whether Section 47B is preempted by the NLRA, for Congress has determined that the parties' resolution of mandatory subjects of collective bargaining must be left to the "free play of economic forces," *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 518 (1981), free from state interference.

> Since the federal law operates here, in an area where its authority is paramount, to leave the parties free, the inconsistent application of state law is necessarily outside the power of the State.

Local 24, International Brotherhood of Teamsters v. *Oliver*, 358 U.S. 283, 296 (1959).

The fact that the state statute may be labeled a workers' compensation statute, an antitrust statute, or an insurance statute, rather than an industrial relations statute, does not matter. *Alessi, supra*, at 518; *Oliver, supra*, at 296. What does matter is the statute's effect, its application. The "crucial inquiry regarding preemption" is whether the "exercise," the application, of the state law "would frustrate effective implementation of the [NLRA's] processes." *Machinists, supra*, at 147-148.

Of those processes, one in particular, the collective bargaining process, has received this Court's special protective care. It is a fundamental principle of federal labor policy that state statutes will not be permitted to interfere with the parties' free negotiation of mandatory subjects of collective bargaining.

> *[T]he fundamental premise* on which the Act is based [is] private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract.

Congress explicitly disclaims any intention to restrict or alter in any way the scope or operation of any federal law, including the NLRA, except those laws specifically repealed or amended by ERISA's express provisions. 29 U.S.C. § 1144(d).

H. K. Porter & Co. v. *NLRB*, 397 U.S. 99, 108 (1970) (emphasis added). There is "no room" in the federal regulatory scheme "for the application . . . of . . . state policy limiting the solutions that the parties' agreement can provide . . . ." *Oliver*, *supra*, at 296.

Section 47B, however, does interfere with the free negotiation of mandatory collective bargaining issues. With respect to health benefits, including mental health benefits, the effect of the statute's application is that the parties are compelled to substitute the state's solution for their own. Although that portion of Section 47B which refers to insurance policies does not expressly, *in haec verba*, direct a change in the terms of an insured collectively bargained plan itself, the practical effect of the statute's operation in this area is the same as if it had. It was clearly not contemplated, for example, that the administrators of such a plan could simply add the mandated term to the plan's insurance policy, but refuse to make any change in the terms of the plan itself, and then refuse also to make payment of the benefit on the ground that the plan does not provide it. The clear import of the statute's terms is that the mandated benefit is to be paid.

Thus, for an insured benefit plan which is the product of collective bargaining, the practical effect of statutes such as Section 47B is that they simply override the terms of the plan. As the evidence in this case showed, where the parties succumb and provide the mandated benefits, a benefit package often results which is disliked by both union and management. Since the parties to collective bargaining have only a limited amount of money to devote to health benefits as a whole, other desired benefits must be reduced or delayed or eligibility requirements stiffened.[7]

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[7] Mr. James M. Dawson, an administrator of several ERISA welfare and pension plans, testified that union members in New Hampshire were "antagonistic" and "belligerent" as a result of that state's mandated mental health benefits law, because "they had to have something they didn't want and to give up something they did want." Many wanted to have or improve

Only by relinquishing the security and protection of insurance—an undesirable alternative from the standpoint of both plans and federal labor policy—can employers with collectively bargained benefit plans avoid the necessity of altering the plans' terms to conform to the mandate of the statute.[8] The necessity to drop all health insurance (or, alternatively, to drop all health insurance for Massachusetts residents) in order to avoid making changes in collectively bargained benefit terms applicable to Massachusetts residents represents a severe and reprehensible constraint upon the bargaining freedom envisioned by the NLRA. Many employee benefit plans simply cannot or should not assume the risks of operation without the financial security, stability, knowledge and experience that insurance companies can provide.

No matter which choice is made—to succumb to the mandated benefits or to give up insured health benefits altogether—the parties must arrive at a collective bargaining agreement which differs from the one at which they would have arrived in the absence of the state statute. Thus the conflict with federal labor law does not depend upon which choice the parties make, or upon which choice the state legislature has sought to induce; the conflict inheres in the state-imposed restriction on the parties' freedom of choice. In the end, the effect of Section 47B, when applied in the context of labor-management relations, is equally as intrusive, equally

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"vision and dental" benefits. "But by taking money and spending it for mental health care, that precludes at this time the benefits that they would really like to have." A number of benefit plans increased their eligibility requirements to allow for the mandated benefit. The Northern New England Carpenters Union not only had to increase eligibility requirements, but also "eliminated all vision and dental care under their package." Appendix filed with Supreme Judicial Court of Massachusetts, 86-92.

[8] The compulsion exercised by the statute affects more than insurance for mental health benefits alone. Because all group health policies must contain the mandated mental health benefits provisions, no group health insurance is available at all unless the plan acquiesces and changes its collective bargaining agreement to conform to the mandate of the statute.

as interfering, equally as frustrating to the NLRA's processes, as would be the effect of a state statute expressly directing the parties to collective bargaining agreements to delete their agreed mental health benefit terms and to insert new terms composed by the Massachusetts Legislature.[9]

In its decision below,[10] the Supreme Judicial Court of Massachusetts recognized that because insured benefit plans have "no choice but to provide mental health care benefits, the insurance provisions of § 47B effectively control the content of [such] plans." App. D, 20a. It accordingly conceded that Section 47B does "impose[ ] some limits on the freedom of labor and management to bargain for health benefit terms. . . ." App. D, 31a. It went on to hold, however, that the state statute was exempt from NLRA preemption on two independent grounds—each one predicated on a novel and unprecedented interpretation of federal law.

II. The McCarran-Ferguson Act Does Not Exempt From Preemption A State Statute Which In Part Concerns Insurance And Which Interferes With Federal Labor Policies Embodied In The NLRA.

The court below held that section 47B was saved from NLRA preemption by Section 2 of the McCarran-Ferguson Act, 15 U.S.C. § 1012. This result was reached despite the fact that another section of the McCarran-Ferguson Act, Section 4,

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[9] *See Michigan United Food & Commercial Workers Unions* v. *Baerwaldt*, 572 F.Supp. 943, 953-54 (E.D. Mich. 1983), *appeal docketed*, No. 83-1570 (6th Cir. August 15, 1983), in which a Michigan statute mandating specified health benefits for group disability insurance policies was held to be preempted by the NLRA. The court emphasized that the state statute

> disturbs a mandatory subject of collective bargaining; namely, the provision of health benefits. Because of its effect, it must be preempted.

[10] The opinion of the Supeme Judicial Court after remand was limited to ERISA preemption, in accordance with this Court's mandate. Hence, the Court's position on NLRA preemption is set forth in its opinion prior to remand; references herein are to that earlier opinion.

specifically provides that nothing in the Act shall be construed to affect in any manner "the application" of the NLRA to "the business of insurance." 15 U.S.C. § 1014. The Massachusetts court's interpretation of the scope of Section 4—an important issue which has never been considered by this or any other federal court—was offered without any analysis or explanation, has no support in the legislative history, makes no sense in the context of the act as a whole, and is simply wrong.[11]

The phrase "the business of insurance" appears in a number of places in the McCarran-Ferguson Act. Section 2(a) of the Act provides that:

> (a) *The business of insurance*, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

15 U.S.C. § 1012(a) (emphasis added). Section 2(b) says:

> (b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating *the business of insurance*, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance. . . .

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[11] A threshold question, not discussed by the court, was whether the McCarran-Ferguson Act applied to Section 47B at all. McCarran-Ferguson's protection extends to "any law enacted by any state *for the purpose of regulating the business of insurance*. . . ." Section 2(b), 15 U.S.C. § 1012(b) (emphasis added). The court below first held, however, that the "*purpose*" of Section 47B "*is to protect public health.*" App. D, 28a. Later it retrenched and said that "[a]lthough the purposes and effect of §47B *extend beyond* regulation of insurance as such," the statute "*operates upon*" insurance and insurance policies. App. D, 30a (emphasis added). Does McCarran-Ferguson's protective cloak extend to state statutes with dominant purposes other than the regulation of insurance? Does it extend to all aspects of a hybrid statute, with several purposes, only one of which purports to be the regulation of insurance?

15 U.S.C. 1012(b) (emphasis added). Section 4 of the Act goes on to provide, however, that:

> Nothing contained in this chapter shall be construed to affect in any manner the application to *the business of insurance* of the [NLRA]. . . .

15 U.S.C. § 1014 (emphasis added).

Thus Congress used the same phrase—*i.e.*, "the business of insurance"—to delineate the basic grant of state authority in Section 2(a), the general immunity from superseding federal legislation in Section 2(b), and the specific reservation of federal regulatory authority under the NLRA in Section 4. It would seem apparent from the language and structure of the Act—giving recognition to the familiar principle of statutory interpretation favoring consistent, harmonious interpretations of identical terms within a single statute—that "the business of insurance" was intended to have the same meaning and scope in all three portions of the Act.

In its decisions construing Section 2 of the McCarran-Ferguson Act, this Court has identified three principal criteria for determining the "business of insurance": (1) whether the activity in question "has the effect of transferring or spreading a policyholder's risk"; (2) whether it is "an integral part of the policy relationship between the insurer and the insured"; and (3) whether it is "limited to entities within the insurance industry." *Union Labor Life Ins. Co.* v. *Pireno*, 458 U.S. 119, 123 (1982). The "core" of "the business of insurance" is

> [t]he relationship between insurer and insured, the type of policy which [can] be issued, its reliability, interpretation, and enforcement.

SEC v. *National Securities, Inc.*, 393 U.S. 453, 460 (1969).

The Massachusetts court, however, disregarded these criteria in arriving at a meaning for "the business of insurance" in Section 4. It concluded that the "most reasonable interpretation of [Section 4] is that *"labor-management relations within insurance companies* are subject to the NLRA" (emphasis added). App. D, 30a, n. 25. The point is treated cursorily, in a footnote. *Id.* No explanation is provided as to why this emasculated version of section 4's scope is the "most reasonable." No hint is given as to how the words or legislative history can ever lead to this result.[12] The court's footnote concludes with the assertion that the defendants' preemption position is "not. . . reasonable"—but, again, no reason is advanced as to why this is so.

The labor relations of insurance companies are not a constituent part of "the business of insurance" within the meaning of Section 2. They do not meet the first two criteria of this Court's three-pronged test. They do not have "the effect of transferring or spreading a policyholder's risk," and they are not "an integral part of the policy relationship between the insurer and the insured." *Union Labor Life Ins. Co.* v. *Pireno, supra*, at 123. *See Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U.S. 205, 216-217 (1979) (the Act's language "exempts the 'business of insurance' and not the 'business of insurance companies' "). If "the business of insurance" in Section 4 has the same meaning as "the business of insurance" in Section 2, as one would reasonably expect, the Massachusetts court's interpretation of Section 4 is simply incorrect.

In any event, the court's reading of Section 4 renders that provision completely superfluous and devoid of application. Since the labor relations of insurance companies are clearly

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[12] The Court cited *Wadsworth* v. *Whaland*, 562 F.2d 70, 79 n. 44 (1st Cir. 1977), *cert. denied*, 435 U.S. 980 (1978), and *Metropolitan Life Ins. Co.* v. *Whaland*, 410 A. 2d 635 (N.H. 1979), for the proposition that the McCarran-Ferguson Act indicates "that Congress did not intend the NLRA to preempt laws such as § 47B." App. D, 30a. However, both of these decisions simply made brief, passing references to Section 2(b) of the McCarran-Ferguson Act without any attempt to address the implications of Section 4.

not a constituent part of "the business of insurance" within the meaning of Section 2, Section 2(a) grants the states no authority to regulate the labor relations of insurance companies; Section 2(b) gives the states no immunity in this respect; and there is accordingly no need to reserve federal authority over such matters in Section 4.

III. Section 47B Is Not Excepted From NLRA Preemption On The Ground That It Is A "Local Health Regulation."

The Massachusetts court held that Section 47B was saved from NLRA preemption on the alternative ground that it is a "local health . . . regulation." App. D, 29a. Although for purposes of the McCarran-Ferguson Act the same state statute was necessarily held to be an insurance regulation, a "law enacted by [a] state for the purpose of regulating the business of insurance" (App. D, 30a), when the court focused on the possible availability of other exceptions to preemption, the classification was changed. Section 47B became, instead, a law the "purpose [of which] is to protect public health." App. D, 28a. Once the label of state "public health law" was affixed, the court resorted to a dictum in *Oliver*, *supra*, at 297, distinguishing, for purposes of preemption, between "a local health or safety regulation" and "state policy which seeks specifically to adjust relationships in the world of commerce." This reference, the court below concluded, "suggested" that state health regulations are excepted from the requirements of federal labor policy.[13] App. D, 28a.

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[13] Whether Section 47B can be properly characterized as the type of conventional "local health regulation" the *Oliver* dictum had in mind is questionable. *See Michigan United Food & Commercial Workers Union* v. *Baerwaldt*, 572 F.Supp. 943, 953 n. 19 (E.D. Mich. 1983), *appeal docketed*, No. 83-1570 (6th Cir. August 15, 1983). Section 47B's regulations focus on, not specified requirements for protecting the public health (*cf.*, *e.g.*, statutes directly regulating such matters as sanitary codes, G.L. c. 111, § 127A; lead poisoning, G.L. c. 111, §191; or air pollution, G.L. c. 111, §31(C)), but

As the Massachusetts court itself recognized, this Court has never held that a state law is exempt from NLRA preemption on the ground that it is a local health regulation. *See* App. D, 28a, n. 23. Shortly after *Oliver*, in the same year, 1959, this Court restructured its ground rules for federal labor preemption in *Garmon*. An exception for state health regulations was not included. Indeed, since *Garmon*, this Court has alluded to the *Oliver* dictum only once, and that was in a footnote wherein the Court refused to pass on its continuing vitality. *See Malone* v. *White Motor Corp.*, 435 U.S. 497, 513, n. 13 (1978).

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who must pay for certain mental health care benefits, and to what extent. The report of the Joint Committee on Insurance of the General Court indicated that mental health care was already "costing Massachusetts taxpayers millions of dollars annually," and that the solution, the Legislature felt, lay in the private sector, with employers. The report emphasized that "there is a great potential for increased revenue for the commonwealth because of third party payments from insurance companies." Prior to Section 47B's passage, studies were made of insured employee benefit plans around the country. The statute, as applied, principally bears upon the employer-employee relationship. As the parties stipulated and the trial court found, "the preponderance of insurance policies affected by G.L. c. 175, § 47B have been issued to employers." App. F., 43a.

As a result, to revert to the *Oliver* dictum, Section 47B, rather than being a "local health regulation," is more nearly akin to a state statute "which seeks specifically to adjust relationships in the world of commerce." *Oliver*, *supra*, at 297. As such, it has no special claim to exemption from NLRA preemption. Moreover, it would appear to be precisely that type of state statute as to which preemption is most appropriate—*i.e.* a statute "resting upon [the state legislature's] views concerning accommodation of the . . . interests" of employer, employees and the public. *Machinists*, *supra*, at 140, n. 4, quoting A. Cox, *Labor Law Preemption Revisited*, 85 HARV. L. REV. 1337, 1352 (1973). It represents an assessment by the state legislature that the Massachusetts worker needs assistance; that collective bargaining is not moving fast enough in the mental health benefits area; and that to help rectify this situation a new accommodation of the interests of the worker, the employer and the public will be made through the mechanism of mandated insurance.

The decisions to which this Court referred in *Garmon* when it spoke of regulated conduct touching "deeply rooted" local interests, as well as the decisions which have applied the *Garmon* language subsequently, were all—without exception—decisions which dealt with "personal torts or violence to property, and their holdings have been closely circumscribed." *Wilkes-Barre Publishing Co.* v. *Newspaper Guild*, 504 F.Supp. 54, 66 (M.D. Pa. 1980), *rev'd in part on other grounds*, 647 F.2d 372 (3d Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982), *on remand*, 559 F.Supp. 875 (M.D. Pa. 1982). *Garmon* itself characterized the cases in this category as cases concerned with state regulation of "conduct marked by violence and imminent threats to the public order," in which the "compelling state interest" was "the maintenance of domestic peace." *Garmon*, *supra*, at 247. *See also Farmer* v. *United Brotherhood of Carpenters & Joiners of America, Local 25*, 430 U.S. 290, 299 (1977) ("cases involving violent tortious activity"). Section 47B does not fit this mold.

All of these cases concerned state regulation in the form of court actions for damages or injunctions based on state law. All presented preemption issues falling within the *Garmon* doctrine, not the *Machinists* doctrine, and were premised upon protection of the primary jurisdiction of the NLRB. In these cases the court concluded that the challenged exercise of state court jurisdiction was permissible only after it determined that the state's action did not present any "realistic risk of interference with the Labor Board's primary jurisdiction to [prohibit] unfair labor practices." *Sears, Roebuck & Co.* v. *San Diego County District Council of Carpenters*, 436 U.S. 180, 198 (1978). The issues for the two tribunals were seen to be different. The tortious conduct sought to be regulated by the state was shown to be not federally protected conduct. There was, in short, "little risk that the state cause of action would interfere with the effective administration of national labor policy." *Farmer*, *supra*, at 298.

Under the *Machinists* doctrine there is in any event, no exception for state laws regulating violence or other conduct touching "deeply rooted" local concerns. *See Belknap, Inc.* v. *Hale, supra*, at 3177; *Local 926, International Union of Operating Engineers* v. *Jones, supra*, at 1459. In the absence of a federal law expressing a Congressional intention to tolerate the particular state interference in question (*supra*, n. 6), state statutes impinging "on the area of labor combat designed to be free" are "an obstruction of federal policy" (*Garner* v. *Teamsters Union*, 346 U.S. 485, 500 (1953)) and are preempted. Section 47B is just such a statute. It interferes with the free exercise of collective bargaining; it exerts precisely the "official compulsion over the. . . terms of the contract" that federal policy was designed to prevent. *H.K. Porter & Co.* v. *NLRA*, *supra*, at 108.

Implicit in the Massachusetts Supreme Judicial Court's approach to the question of NLRA preemption is the thought, unstated but nevertheless suggested, that if the state's interest could be said in some sense to outweigh the federal interest, conflict between the state statute and the NLRA should be overlooked and preemption denied. Along this line, the Court concluded that Section 47B is "addressed to a statewide health problem," whereas its impingement on collective bargaining freedom, although undeniably present, was not an "absolute" restriction, because parties could preserve their freedom to negotiate mental health benefits by electing to give up all health insurance. *See* App. D, 31a.

Quite apart from the fact that the decision whether or not to insure health benefits is itself protected by the NLRA from state interference, and the fact that being forced to relinquish all health insurance in order to retain freedom to bargain over mental health benefits is certainly a serious interference with the collective bargaining process, the overall premise of the Massachusetts court's approach is incorrect. This Court has not subscribed to any simple balancing test for resolving

Machinists preemption issues. Under the *Machinists* doctrine, the NLRA "proscribes state regulation [of] conduct that Congress intended to be unregulated. . . ." *Belknap, Inc.* v. *Hale, supra*, at 3177. Balancing of the state and federal interests is not involved. A state statute that interferes with the free negotiation of mandatory subjects of collective bargaining is therefore preempted, whether or not it also addresses a legitimate state concern. Section 47B is such a statute.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted,

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